In The Supreme Court of Bermuda

COMMERCIAL COURT

CIVIL JURISDICTION

2013: No 238

BETWEEN:-

TRUSTEE L AND OTHERS

Plaintiffs

-and-

THE ATTORNEY GENERAL AND OTHERS

Defendants

RULING

(In Chambers)

Costs of Beddoe proceedings– whether Trustees entitled to recover their costs of the proceedings from the Trust fund – whether person resisting Beddoe application entitled to recover their costs from the Trust fund – whether Trustees entitled to recover their costs of the proceedings, including interlocutory applications, from person resisting Beddoe application, and, if so, whether on a standard or indemnity basis

Date of hearing: 14th – 16th December 2015
Date of ruling: 24th March 2016

Mr Alan Boyle QC, Mr Jonathan Adkin QC and Mr Narinder Hargun, Conyers Dill & Pearman, for the Plaintiffs

Mrs Elspeth Talbot Rice QC, Mr Mark Cran QC, Ms Emma Hargreaves and Mr Rod Attride-Stirling, ASW Law Limited, for the Second Defendant

The other Defendants did not appear and were not represented

Introduction

1. This is a ruling as to the costs of a Beddoe application. I shall refer to the hearing of the application as "*the costs hearing*". The Plaintiffs are the trustees ("the Trustees") of certain Bermuda purpose trusts ("the Trusts"). The Second Defendant ("D2") is a child of the late S.

2. D2 is heir to a substantial share of S's estate ("the Estate"). D2 has brought proceedings against the Trustees ("the Main Action") in which D2 claims *inter alia* that all the Trusts are void, or alternatively that the transfers of assets into the Trusts should be set aside ("the primary case"), and that those assets form part of the Estate. The value of the assets held by the Trusts is very substantial.

3. The directors of the Trustees include Child 1 and Child 2, who are children of S, and two children of S's late brother, T. For ease of reference, I shall refer to them collectively as "the Family Directors". The remaining director was the late X, a trusted senior employee who was instrumental in setting up the trust structure.

4. In July 2013 the Trustees issued an originating summons – a Beddoe application – in which they sought directions from the Court in relation to what position they should take in the Main Action and as to the administration of the Trust assets pending its resolution. Following a contested hearing which lasted five days I issued a ruling dated 15th May 2015 in which I gave the Trustees leave if so advised to defend D2's primary

case in the Main Action down to the conclusion of the trial at first instance and granted them an indemnity from the Trust fund for that purpose. I also approved the Trustees' revised proposals for the expenditure of Trust monies pending the resolution of the Main Action. D2 had opposed the Trustees' initial proposals, but did not object to the proposals in their revised form.

Applicable legal principles

5. The Court's power to award costs is governed by Order 62 of the Rules of the Supreme Court 1985 ("RSC"). The relevant parts of the rules are as follows:

6. Order 62, rule 3(3) provides:

"*If the Court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the Court shall order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.*"

7. Order 62, rule 6(2) provides:

"*Where a person is or has been a party to any proceedings in the capacity of trustee, estate representative or mortgagee, he shall be entitled to the costs of those proceedings, in so far as they are not recovered from or paid by any other person, out of the fund held by him in that capacity or out of the mortgaged property, as the case may be, and the Court may order otherwise only on the ground that he has acted unreasonably or, in the case of a trustee or estate representative, has in substance acted for his own benefit rather than for the benefit of the fund.*"

8. Order 62, rule 10(1) provides:

"*Where it appears to the Court in any proceedings that any thing has been done, or that any omission has been made, unreasonably or improperly by or on behalf of any party, the Court may order that the costs of that party in respect of the act or omission, as the case may be, shall not be allowed and that any costs occasioned by it to any other party shall be paid by him to that other party.*"

9. The trustees' costs of a Beddoe application will generally fall under Order 62, rule 6(2). Thus they are an exception to the general rule in Order 62, rule 3(3). The costs of the other parties to a Beddoe application are generally dealt with in the same way. As Kekewich J stated in In re Buckton [1907] 2 Ch 406 Ch D at 414 – 415:

> "*In a large proportion of the summonses adjourned into Court for argument the applicants are trustees of a will or settlement who ask the Court to construe the instrument of trust for their guidance, and in order to ascertain the interests of the beneficiaries, or else ask to have some question determined which has arisen in the administration of the trusts. In cases of this character I regard the costs of all parties as necessarily incurred for the benefit of the estate, and direct them to be taxed as between solicitor and client and paid out of the estate. … I cannot remember any case in which I have refused to deal with the costs of an application by trustees in the manner above mentioned.*

10. Thus, as Lloyd LJ stated in Davies v Watkins [2013] CP Rep 10; [2012] EWCA Civ 1570 at para 26 in the specific context of a Beddoe application:

> "*the normal rule is that, absent improper conduct, the costs of the trustee and of the beneficiary defendants will be paid out of the trust fund.*"

11. This was the first of three classes of cases which Kekewich J identified in relation to the administration of an estate. The second class at 414 – 415 was in substance the same, but where the application was brought by a beneficiary rather than the trustee. In such a case the costs of all parties would also generally be borne by the estate. The third class at 415 was where a beneficiary brought a claim adverse to other beneficiaries, but using an originating summons rather than a writ. In such a case the court was required to determine the rights of adverse litigants and costs would follow the event. Class three cases involve claims between rival claimants to the fund or part of it, not hostile claims against trustees. See In re JP Morgan 1998 Trust [2013] (2) JLR 239 *per* Nugee JA, giving the judgment of the Jersey Court of Appeal, at para 30.

12. The Buckton classes are not intended to be exhaustive. See In re Savile [2015] BPIR 450; [2014] EWCA Civ 1632, *per* Patten LJ at para 110. Eg in Green v Astor [2013] 6 Costs LO 911; [2013] EWHC 1857 (Ch) the administrator sought *inter alia* the Court's authorisation to enter into a Partition Agreement in relation to the apportionment of costs and the distribution of another estate in which the estate she was administering had an interest. The Court's authorisation was only sought because of the strong opposition of one of the beneficiaries, Mr Astor, to the Partition Agreement. Roth J granted the administrator's application. The administrator sought an order that Mr Astor should pay the costs of the application and the judge agreed. He stated at para 56:

> "*Although in form an application that comes within category (1) of Buckton, I do not think it falls neatly within Kekewich J's tripartite classification. It has far more the character of hostile litigation, in which the other individual beneficiaries support the position of the personal representative, who has faced sustained hostility and opposition from the one beneficiary who has opposed this claim. Having regard to the overall justice of the case, I do not regard this as one where the costs should fall on the estate, and thus be at the expense of all the beneficiaries. The appropriate order, in my judgment, is that the costs referable to the second head of relief should be paid by Mr Astor.*"

13. These authorities speak about the costs of trustees and beneficiaries. However in my judgment all parties who have been properly joined to a Beddoe application or analogous trustees' application for directions should, absent disqualifying conduct on their part, normally be paid out of the trust fund, even if they are not trustees or beneficiaries.

14. This is a situation which has arisen infrequently in the reported cases. The one authority on point to which I was referred was In re Savile [2015] BPIR 450; [2014] EWCA Civ 1632. The proceedings related to the estate of the late Jimmy Savile, a well known television presenter in the UK. His estate was facing personal injury claims by a large number of people who alleged that he had sexually abused them ("the PI claimants"). There was no serious dispute that some, perhaps many, of the claims might be well-founded.

15. The executor brought an application for the approval of a scheme to adjudicate the personal injury claims. The PI claimants were defendants to the application and supported the scheme. The residuary beneficiary opposed it. Sales J not only made an order approving the scheme but also ordered that the residuary beneficiary pay the costs of the executor and the PI claimants on an indemnity basis. The costs order was made on the ground that the approval application was really a piece of adversarial litigation, and that costs should therefore follow the event.

16. On appeal, the Court held that the residuary beneficiary's opposition to the scheme was not sufficient to convert the approval application from a Buckton class one to a Buckton class three case, and that the residuary beneficiary's costs of the approval application should therefore be paid out of the estate on an indemnity basis. The Court held that so, too, should the costs of the executors and the PI claimants. As to the latter, Patten LJ, giving the judgment of the Court, stated at para 120 that they should be awarded their costs because they were "*necessary and proper*" parties in the rather unusual circumstances of the case and were entitled to be heard on the application. Provided that a party has been *properly* joined, I see no reason in principle why their joinder must also be *necessary*, although no doubt it often will be. Thus at para 78 Patten LJ stated that the judge was entitled to conclude that the PI claimants had a sufficient interest in the administration of the estate to make them "*proper*" parties to the approval application.

17. In Davies v Watkins, as noted above, the Court held that what would disqualify a trustee or beneficiary from an award of their costs out of the trust fund was "*improper*" conduct. This test goes back at least as far as In re Beddoe [1893] 1 Ch 547, in which Lindley LJ stated at 558:

> *"I entirely agree that a trustee is entitled as of right to full indemnity out of his trust estate against all his costs, charges, and expenses properly incurred ... The words 'properly incurred' in the ordinary form of order are equivalent to 'not improperly incurred."*"

18. Bowen LJ at 562 added the gloss that: "*'properly' means reasonably as well as honestly incurred*". Thus improper conduct includes unreasonable conduct. The courts have sometimes spoken in terms of unreasonable rather than improper conduct – eg Roth J in Green v Astor [2013] 6 Costs LO 911; [2013] EWHC 1857 (Ch) at para 54 and MC St J Birt, Bailiff, in Garnham v PC and others [2012] JRC 078 Royal Court – but I do not take them to be propounding a different test.

19. In Bermuda under RSC Order 62, rule 6(2) a trustee or estate representative will be allowed his costs from the trust or estate unless he has acted unreasonably. It is clear from In re Buckton and Davies v Watkins that a beneficiary is allowed his costs by analogy with a trustee or estate representative. The analogy was drawn explicitly by Hoffmann LJ (as he then was) in McDonald v Horn [1995] 1 All ER 961 EWCA at 970 h – j, albeit in a different factual context. Thus a beneficiary who has acted unreasonably will also have his costs disallowed.

20. However even strong opposition by the beneficiary does not in itself amount to acting unreasonably. As Patten LJ stated in In re Savile at para 112:

> *"... opposition by a beneficiary to a proposed course of action by a trustee or personal representative is not, without more, sufficient to justify a departure from the general rule that the costs of all necessary parties to a Buckton class 1 or class 2 application should be borne by the trust fund or estate. Strong opposition is often encountered, in my experience, in applications for directions by, for example, the trustees of pension funds particularly where the proposed course of action will either cast additional financial burdens on the employer or reduce the fund available to a particular class of member. Nobody has ever suggested that the often lengthy proceedings which this leads to should give rise to adverse orders for costs of the kind made in this case.*"

21. Nugee JA, giving the judgment of the Jersey Court of Appeal in In re JP Morgan 1998 Trust [2013] (2) JLR 239, put what was essentially the same point in a slightly different way at para 44:

> "*As the Bailiff said in In re Dunlop Settlement (7) [2013] JRC 123, at para. 27, it will often, and probably usually, be the case that a beneficiary puts forward a stance that he*

considers will be to his benefit; this does not of itself take the matter outside [Buckton] category 2 …"

22. Under RSC Order 62, rule 10(1) a party who has acted unreasonably or improperly may not only have his costs disallowed but may be ordered to pay the costs of any other party incurred as a result of such conduct. Thus in Green v Astor Roth J stated at para 54:

"*… where unreasonable conduct by a beneficiary is responsible for generating substantial costs on the part of a trustee or personal representative as regards an application to the court, it is appropriate that the burden of those costs should be borne by that beneficiary and not fall on the trust or estate and thus the beneficiaries as a whole.*"

23. Lewin on Trusts[1] expresses the principle thus at para 27-260. A beneficiary who commences proceedings against the trustees and thereby necessitates a Beddoe application will not by reason of having done so be deprived of his costs of a Beddoe application or ordered to pay the trustees' costs:

"*Such a beneficiary might, however, become at risk as to costs if he adopts an excessive role in the Beddoe application and seeks to use it as a forum for promoting his claim in the third party proceedings.*"

24. Obviously, conduct that results in an order for costs against a party will be more unreasonable than conduct which merely results in that party having his costs disallowed. I was referred to various cases in which a beneficiary's costs were either disallowed simpliciter or with an order that the beneficiary pay the costs of the trustee or estate representative. As each case turned on its own facts, none of which were particularly close to the facts of the Beddoe application before me, I do not propose to review them all.

25. A party engaging in conduct which is really unreasonable will be at risk of an order that he pay costs on an indemnity basis. The circumstances which may give rise to such an order include fraud or grave impropriety, but are

[1] Nineteenth Edition, 2015.

not confined to cases where litigation has been misconducted by the losing party. The underlying nature of the claim may also be relevant. See American Patriot Insurance Agency Inc v Mutual Holdings (Bermuda) Ltd [2012] Bda LR 23 *per* Evans JA, giving the judgment of the Court of Appeal, at paras 26 – 27 and 29.

26. Eg in Grender v Dresden [2009] EWHC (Ch) 500, Mr and Mrs Dresden had used a construction and trust administration application, to which they chose to become parties, as a vehicle for raising many issues not germane to the questions before the court but upon which they had campaigned for years. Norris J held at para 22(g) that they must pay the costs incurred by the claimant trustees in reading, considering and responding to this material, and at para 24 that those costs should be assessed on an indemnity basis:

> "*I accept [counsel's] submission that it is the proper and condign basis in a case where a party's conduct of proceedings has been disgraceful or deserving of moral condemnation, as that of Mr and Mrs Dresden has been (both in respect of the personal attacks on individuals and on the selection of issues to evidence and argue).*"

27. Nonetheless, MC St J Birt, Bailiff suggested in In re Dunlop [2013] JRC 123 Jersey Royal Court at para 33 that when determining what constitutes unreasonable conduct: "*… the approach of the Court in relation to a beneficiary is more flexible*". He had developed this point more fully in Garnham at para 28:

> "*The expression 'unreasonably' must be applied in its context and the position of the beneficiaries is not the same as that of an executor or trustee. The latter owes fiduciary duties to all the beneficiaries and, whilst it may not be unreasonable for a beneficiary to make a request of executors (or trustees) to act in a particular way, a decision by the executors to do so despite their fiduciary obligations to all the other beneficiaries, may be categorised as unreasonable on their part such that, if they seek to defend it, they may be deprived of their costs.*"

28. The case concerned a family dispute. A point came when, viewed objectively, the position taken by one of the beneficiaries was unreasonable. She was the late testator's wife, and had been married to him for more than

fifty years. The court held at para 30 that it would be "*wholly inappropriate*" to order her to pay the costs of any other parties as she was simply putting forward strongly and sincerely held views as to her late husband's wishes. It further held at para 31 that, as the wife did not owe fiduciary duties, and as an order that she pay her own costs might well exacerbate the disunity among the family members, she could recover her costs from the estate on an indemnity basis.

29. The Bailiff made an order for costs in relation to the wife which was tailored to the particular facts of the case. But he was not proposing that as a beneficiary does not owe fiduciary duties to the trust or estate she can, as a general rule, conduct Beddoe or analogous proceedings unreasonably with no risk as to costs simply because her conduct is based on strongly and sincerely held views. That is, after all, exactly how Mr and Mrs Dresden had behaved in Grender v Dresden.

30. As Patten LJ stated at para 109 of In re Savile:

> "*The Court has in such cases to distinguish between genuine points pursued in argument which are germane to the issue under consideration but which ultimately fail and points taken or applications made for no good or proper reason or which are motivated out of animosity towards the other parties. Applications for directions in relation to the administration of a trust or an estate should be critical but also constructive.*"

31. In England and Wales, any party to a Beddoe application who intends to apply for an order for payment of his costs from the trust fund must give notice of that intention to the other parties. See Lewin on Trusts at para 27-260. However the source of that principle is stated to be a Practice Direction under the Civil Procedure Rules[2], and there is no equivalent provision in the RSC.

32. The principles set out in the preceding paragraphs will not necessarily apply to any interlocutory applications made in the course of Beddoe or analogous

[2] Practice Direction 3F – Costs Capping, para 5.4.

proceedings. Depending upon the nature of such applications, the court may treat them as hostile litigation with costs following the event. That is what happened in Trustee 1 et al v The Attorney General et al [2014] CA (Bda) 3 Civ, which was an interlocutory appeal in Beddoe proceedings regarding an order for disclosure of a document. The Court awarded the successful appellants their costs both on appeal and below.

Main *Beddoe* proceedings

33. As Alan Boyle QC, who appeared for the Trustees, submitted, the statistics in the present case are extraordinary. There are 53 affidavits or affirmations before the Court, which fill three lever arch files. The exhibits fill a further 15 lever arch files. At first instance, and prior to the costs hearing, the parties filed 28 skeleton arguments. There have been 1,924 pages of correspondence, virtually all of it contentious. Prior to the substantive hearing, and not counting time summonses, there were six interlocutory summonses filed by D2 and one by the Trustees, which gave rise to hearings on four separate days. There was also an interlocutory appeal, which lasted two days. At most of the hearings, both parties have been represented by two QCs. To put these figures in context, the Trustees' estimated costs of the Main Action run to tens of millions of dollars. The value of the trust assets exceeds that sum by several orders of magnitude.

The Trustees' costs

34. It is common ground that, pursuant to Order 62, rule 6(2), the Trustees are entitled to recover their costs of the Beddoe application on an indemnity basis. That is, to the extent that they do not recover those costs from D2. However it has emerged since the costs hearing that the parties disagree about what flows from that. They have made written submissions on the point.

35. In my judgment the Trustees' costs should be treated analogously to their costs of the Main Action. Ie if D2 succeeds on all or part of D2's claim in the Main Action, but not otherwise, the Trustees' costs of the Beddoe application may be taxed at D2's option on an indemnity basis, and D2 shall have the opportunity to attend at the taxation and make representations. If D2 does not succeed, there will be no need for a taxation to take place as in that event the Trustees' costs of the Beddoe application will be no concern of D2's.

D2's costs

36. Mrs Talbot Rice QC, who appeared for D2, submitted that D2 should be able to recover D2's costs of the Beddoe application on the same basis as this was a Buckton class one case. In other words for costs purposes it was a normal Beddoe application. Mr Boyle resisted this application and submitted that costs should follow the event, as did Jonathan Adkin QC, who also appeared for the Trustees.

37. They argued that D2's conduct of the Beddoe application placed it outside any of the Buckton categories as D2 had adopted an excessive role in the Beddoe application, which D2 had treated as hostile litigation and used to try and further D2's claim in the Main Action. Eg by using the Beddoe application as an arena to try out different case theories and attempting to forestall any defence to the Main Action by preventing the Trustees from using trust monies to fund the defence. Alternatively, they submitted, the Beddoe application was for that reason in substance a Buckton class three case. The fact that D2 was not even a beneficiary, they submitted, was a further factor militating against a costs award in D2's favour. In a Third Affirmation, D2 stated that the Trustees:

> "*... are behaving as if their so-called Beddoe application is just another theatre in a long and bitterly fought family war of attrition.*"

Counsel for the Trustees submit that this was exactly how D2 had fought the Beddoe application.

38. Although Mr Boyle and Mr Adkin put their submissions most persuasively, Mrs Talbot Rice has satisfied me that this is a Buckton class one case. It is true that D2 has vigorously opposed the grant of Beddoe relief, but that is not sufficient to lift this case out of that category. Neither am I satisfied that D2 has conducted the main Beddoe proceedings with an ulterior motive. The various interlocutory applications made by D2 are another matter, and I shall deal with them separately.

39. I accept that D2's case has – to put it neutrally – changed somewhat during the course of the Beddoe proceedings, but D2 has throughout sought to demonstrate that no Beddoe order should be made because there was a proper contradictor who would defend the Main Action in its absence. Moreover, before granting Beddoe relief the Court had to be satisfied that the Trustees had sufficient prospect of success to justify them in defending the Main Action. D2's lengthy and detailed submissions at the Beddoe hearing – together with those of the Trustees – helped me to obtain a sufficiently firm grasp of the merits of D2's primary case to make a Beddoe order in the terms that I did rather than authorising the Trustees to defend the primary case only up to, say, the close of discovery.

40. Although the Trusts, being purpose trusts, have no beneficiaries, D2 asserts an interest in the trust assets as the principal beneficiary of S's estate. Not only was D2 therefore properly joined to the Beddoe proceedings, but D2 was joined by the Trustees.

41. In a Second Affirmation, D2 stated that D2 was paying for the proceedings. D2 resiled from that position in a Fourth Affirmation dated 11th May 2015 as the costs of the Beddoe application had burgeoned beyond D2's original expectations. In my judgment D2 was entitled to reconsider the position and cannot fairly be criticised for doing so.

42. That leaves as an issue the reasonableness of D2's conduct in defending the Beddoe proceedings. As this is a matter for detailed consideration on taxation, I shall treat it with a fairly broad brush. Reasonableness falls to be assessed in the context that it is estimated that the indemnity claimed by the Trustees from the Trust assets will be in the sum of tens of millions of dollars. In other circumstances a claim for that amount might form the basis of a substantial piece of commercial litigation. Costs might reasonably be incurred in contesting a Beddoe application for such a large indemnity which might not be reasonable where the indemnity claimed was much smaller.

43. D2 was joined to these proceedings in part so that pursuant to RSC Order 15, rules 12, 13 and 15 D2 could be appointed to represent the estate and heirs of S. The Trustees, in light of what they perceived as D2's hostile attitude, did not proceed with the application to appoint D2 to act in a representative capacity, and D2's own application to be appointed as a representative was dismissed. However that was not until the pre-trial review.

44. Admittedly, the purpose of appointing D2 to represent the heirs and estate was simply to ensure that they were bound by any order that the Court might make in the Beddoe proceedings. The observations made by Baker JA in the Trustee 1 case at paras 53 and 54 are applicable to D2's situation:

> "*These are rules of administrative convenience. They are procedural and do not confer substantive rights. ... The order under Order 15 rule 15 was sought in the originating summons for procedural convenience as both sides were well aware ...*"

45. However, I accept that, whatever D2's formal position in the Beddoe proceedings, so far as D2 was concerned D2 was consciously acting in the best interests of S's heirs as well as D2's own best interests. That circumstance forms part of the background against which the reasonableness of D2's conduct in these proceedings falls to be assessed.

46. I bear in mind that the background to the Main Action is a bitter family dispute. That bitterness has influenced these Beddoe proceedings from an early stage.

47. In view of the amount of the indemnity at stake and the background family dispute, the Court will accord a generous margin of appreciation when assessing the reasonableness of D2's conduct.

48. However, no matter how strongly or sincerely D2 believed in the rightness of what D2 was doing, that belief cannot transmute conduct which is manifestly unreasonable into reasonable conduct. D2 is a wealthy and successful business person who has been involved in litigation over S's estate in several different jurisdictions and who has had the advantage of legal advice from law firms and counsel of the highest calibre. D2 is, in short, an experienced litigant and sophisticated consumer of legal services. D2's position in this respect is not really comparable to that of the beneficiary in Garnham.

49. As submitted by Mr Boyle, the Beddoe proceedings fell into five stages. The first stage comprised the preparation and service of the originating summons and supporting evidence. It ended in 3rd September 2013, when the Trustees completed service of their evidence in support of the Beddoe application. The second stage comprised the first round of D2's evidence and the Trustees' evidence in reply. D2 served evidence in November 2013 and the Trustees responded in January 2014.

50. On 2nd April 2014 the Court made an order that:

> "*On or before Wednesday, 14th May 2014, [D2] may file further evidence responding to new evidence filed by the [Trustees] which is not merely responsive to [D2's] evidence and/or which the [Trustees] should have properly included in their original evidence in July 2013.*"

D2 served a second round of evidence in May 2014 and the Trustees responded to it in December 2014. That was the third stage. The fourth stage comprised correspondence, largely in January 2015, and the pre-trial review on 27th February 2015. The fifth stage comprised the Beddoe hearing, which took place on 23rd – 27th March 2015.

Costs reasonably incurred

First stage, pre-trial review, fifth stage

51. It is not disputed that D2 should have D2's costs of the first stage. I am satisfied that D2 should have as well D2's costs of the pre-trial review, subject to any separate costs order that I make with respect to an interlocutory summons which was dealt with on that occasion. D2 should also have D2's costs of the fifth stage. I was greatly assisted by the precise, focused submissions at the Beddoe hearing made by both parties. These orders for costs, which are to be met from the Trust fund, are subject to taxation on an indemnity basis.

Trustees' future expenditure

52. Prior to the Beddoe application, the parties reached agreement – or at least a position which D2 did not oppose – as to the expenditure of Trust funds pending the resolution of the Main Action. I shall call this "*the expenditure issue*". Previously, such expenditure had been contested. I found D2's evidence on this point helpful as it gave the Court a fuller and more rounded picture of the Trusts' historical expenditure. Eg D2's evidence that their charitable and philanthropic activity had been relatively modest in comparison with the much larger amount of Trust monies which had been used to acquire shares in the group of companies ("the Companies") which S and T had founded.

53. In a Second Affirmation, D2 raised concerns regarding the tax implications in country Z of the purchases of shares in the Companies and a possible breach of disclosure rules in country Z regarding the shareholding of one of the Companies. D2 filed expert evidence to support these concerns. They were addressed to D2's satisfaction by an order that pending the Main Action the price, amount and timing of any purchases of shares in the Companies would be placed in the hands of independent third parties.

Consequently, the Court was not required to form a view as to their merits. However I am not satisfied that in raising them D2 acted unreasonably.

54. The upshot is that D2 should have D2's costs of the expenditure issue from the Trust fund taxed on an indemnity basis.

Costs unreasonably incurred

Share price manipulation

55. Under the heading "*Share Price Manipulation: Commercial Incentives to Defend*" in a Second Affirmation, D2 alleged that the directors of the Trustees had an incentive to defend the Main Action as they were the beneficiaries of a share manipulation scheme in respect of shares in the Companies:

> "*I have reviewed [the main Companies'] share capital movement since the Trusts' formation. I believe that most shares have been purchased on the secondary market, thus potentially driving up the price and further limiting the market for public investors. This programme of share price manipulation may even be an offence in [country Z].*"

56. D2 then reviewed a report headed "*2008 Report Regarding Utilization of Cash Dividends of Offshore Trust Companies*" signed by X and another senior employee, Y. It was addressed, among others, to Child 1. The report stated: (i) the amount of the cash dividends received by three of the Trustees in 2008; (ii) that it was proposed to use the dividends to purchase shares in three of the Companies as a long term investment; and (iii) that the purchase price would be the "*floor price*" as the share prices had fallen over the past year.

57. D2 concluded:

> "*To me, the document shows the Trusts were engaged in potential insider trading, share price manipulation, improper tax avoidance and breaches of securities rules.*"

D2 asserted that the Trusts were used as a secret means of augmenting the wealth of the Family Directors and X. The Family Directors were the proper contradictors, it was alleged, because they were the ones who benefited from the share price manipulation. D2 filed expert evidence which was relied upon as providing support for these allegations.

58. For good measure, under the heading "*Money Laundering concerns*", D2 suggested:

> "*In this context there are good grounds for thinking the on-going administration of the Trusts might amount to a potential breach of criminal provisions in [country Z] law of insider dealing, stock market manipulation and reporting requirements for purchase of listed securities …*"

59. None of these allegations, which I shall call "*the share price manipulation allegations*", were pursued at the substantive hearing of the Beddoe application. However they were not abandoned until after the Trustees had incurred the cost of adducing evidence to meet them.

60. Mrs Talbot Rice submitted that it was unnecessary to pursue the allegations of share price manipulation because they had been rendered moot by the arrangement that the purchase of shares in the Companies should be placed in the hands of independent third parties. But that arrangement was only temporary, pending the determination of the Main Action. If the Family Directors were manipulating share prices to enrich themselves before the arrangement, they would have every incentive to defend the Main Action so that they could continue to manipulate share prices once the Main Action had concluded. So Mrs Talbot Rice's explanation of why this point was abandoned is not at all convincing.

61. The allegations of share price manipulation were serious allegations of criminal conduct. On the evidence before me they were made without adequate foundation and should not have been brought. D2's conduct in bringing them; putting the Trustees to the cost of defending them; and then abandoning them without any adequate explanation, is not merely

unreasonable and improper: it is disgraceful and deserving of moral condemnation. D2's costs incurred in relation to those allegations, including the allegations of money laundering, are disallowed and I order that D2 pay the Trustees' costs of meeting them taxed on an indemnity basis.

Proceeds of crime

62. D2 subsequently made further allegations of money laundering, which I shall call "*the proceeds of crime allegations*". They arose like this. In a Second Affirmation D2 gave evidence of a meeting which took place in January 2009 with X and Y in which they revealed to D2 for the first time the existence of the Trusts, and a further meeting with X, Y and the heirs of S which took place later in January 2009. The Trustees filed affidavits in reply from X and Y which gave a different account of the meetings. D2 filed a Third Affirmation which exhibited transcripts of both meetings, which D2 had surreptitiously recorded.

63. As a dispute had arisen as to what was said at both meetings, it was reasonable of D2 to prepare and exhibit the transcripts in an attempt to resolve the dispute. However, in flagrant breach of the Court's order of 2nd April 2014, D2 used the transcripts as the foundation for fresh allegations of money laundering, this time that the Trust assets were the proceeds of income tax fraud by S. D2 filed expert evidence from an accountant in support. Insofar as they were relevant to any issue in the Beddoe proceedings, these allegations could and should have been raised in D2's first round of evidence.

64. The allegations were not made to demonstrate the strength of D2's claim in the Main Action or the existence of a proper contradictor. Rather, initially at least, they were put forward to nonsuit the Beddoe application. Thus D2's attorneys stated in a letter dated 3rd June 2014 to the Trustees' attorneys:

"*We will be submitting also that, regardless of the potential money laundering offence(s) that may be committed in Bermuda, the Court should not exercise its discretion to award*

Beddoe relief in circumstances where it has evidence, not so far countered in any respect, that the Trust Funds are tainted by the proceeds of crime."

65. The rationale for this bold submission was stated to be that if the Court granted Beddoe relief to the Trustees:

"*... there is a risk that this may be construed by your clients or third parties as absolving your clients from their money laundering obligations*".

This was notwithstanding that, as the letter went on to acknowledge, such a construction would not be correct. Thus, the letter continued, if the Court did not refuse Beddoe relief it should at the very least make the grant of such relief conditional upon the Trustees obtaining the consent of the Financial Intelligence Agency ("FIA"). This was pursuant to the reporting regime under Part V of the Proceeds of Crime Act 1997 ("POCA").

66. By a letter dated 13th June 2014, the Trustees' attorneys sought particulars from D2's attorneys of the allegations of criminality, which, by a reply dated 18th June 2014, D2's attorneys declined at this stage to provide. By a letter dated 24th June 2014 the Trustees' attorneys invited D2's attorneys to explain on what basis D2 and the other heirs were, as D2 claimed in the Main Action, entitled to any of the Trust assets if the assets were all liable to be forfeited[3] as the proceeds of crime by the authorities in country Z or Bermuda. This letter struck a nerve, because by a letter dated 25th July 2014 D2's attorneys stated, somewhat inconsistently with their client's previous position:

"*To be clear, it is your witnesses, [X] and [Y], who claim that [S] engaged in criminal conduct, not [D2]*."

67. In December 2014 the Trustees filed an affidavit from X rebutting D2's allegations. But D2 persisted in the allegations although D2's position continued to evolve. By a letter dated 28th January 2015, D2's attorneys put forward various proposals to resolve the Beddoe proceedings. These were

[3] In Bermuda the more accurate term would be "*confiscated*".

expressed to be subject to the Trustees obtaining clearance from the relevant Bermuda money laundering authorities to the expenditure of Trust funds for the purposes of the proposed agreement or alternatively a direction from the Court, which D2 would not oppose, that the Trustees were under no obligation to obtain such clearance.

68. At the pre-trial review, Brian Green QC, who appeared for D2, stated that D2 was not submitting that because of the proceeds of crime issue the Court should not grant Beddoe relief, which is precisely what D2's attorneys had submitted previously. Rather, D2 submitted, the proceeds of crime issue was something which had to be resolved as a precondition for the grant of Beddoe relief. This could be achieved by the Trustees satisfying the Court either that a disclosure had been made or alternatively that one was not necessary.

69. At the Beddoe hearing the Court ruled that the proceeds of crime issue was not relevant to the Beddoe application. POCA did not impose a positive duty to disclose suspicious transactions: rather, making a disclosure provided a defence to certain money laundering offences. The decision to disclose was that of a potential defendant: the Court could not make it for him (or her). An order for Beddoe relief would not provide a defence to a money laundering offence or even mitigation. It would therefore not absolve the Trustees or their directors from the need to consider their position under POCA to the extent that in their independent judgment they considered that Act to be engaged.

70. In short, the proceeds of crime allegations were irrelevant to the Beddoe application, which was not an appropriate forum in which to raise them. Even if it had been, D2 had forfeited the right to raise them without leave of the Court as they were fresh allegations which fell outside the terms of the order of 2nd April 2014. The allegations were in my judgment convincingly rebutted by X. D2's costs of the proceeds of crime allegations are therefore disallowed and I order that D2 pay the Trustees' costs of meeting them taxed on an indemnity basis.

71. Further consideration of the reasonableness of D2's conduct of the Beddoe proceedings must await detailed consideration on taxation. Nothing is to be inferred as to the reasonableness or unreasonableness of any aspect of it from the fact that such aspect is not addressed in detail by this ruling.

Interlocutory applications

72. The costs of six interlocutory summonses brought by D2 remain outstanding. The first of these was an application to vary a confidentiality order made by the Court so as to allow D2 to deal with press reports in country Z. Its purpose was not to further the Beddoe proceedings.

73. Three of the remaining summonses were directly relevant to the Beddoe proceedings, namely D2's application to be appointed to represent the estate of S; D2's second application for the production of documents; and D2's application for an indication from the Court that it would be assisted by the production of further documents. However I am satisfied that they were also intended to serve the collateral purpose of advancing D2's position in the Main Action by obtaining further documents for use in those proceedings or, by appointing D2 as estate representative, to put D2 in what was hoped would be a stronger position to obtain such documents.

74. In forming that view, I have been influenced by D2's summons to vary the aforesaid confidentiality order so as to permit D2 to use certain documents disclosed by the Trustees in the Beddoe proceedings in the Main Action. That summons, like D2's summons for a pre-emptive costs order in respect of arguing a particular issue in the Main Action, is directly relevant to the Main Action. The costs of both summonses are outstanding.

75. D2 lost all six of these applications and I see no good reason why costs should not follow the event. D2's costs of the summonses are therefore disallowed and D2 will pay the Trustees' costs of each of them, taxed on a standard basis. In so ordering, I am following the approach of the Court of Appeal in the Trustee 1 case.

When taxation should take place

76. Taxation of the Trustees' costs (insofar as necessary) and D2's costs will take place at the conclusion of the Main Action. It is sensible and cost effective that taxation of all matters relating to the Beddoe proceedings should take place at the same time.

77. It is true that RSC Order 62, rule 29(1) provides that the party seeking taxation must begin proceedings for taxation within six months of the conclusion of the cause or matter in which the proceedings arise unless the Court orders that costs ought to be taxed at an earlier stage under rule 8(2). However Order 3, rule 5(1) provides that the Court may by order extend the period within which a person is required by the rules to do any act in any proceedings. This is an appropriate case for the Court to make such an order.

Summary

78. The Court makes the following orders as to costs.

(1) The Trustees are entitled to recover their costs of the Beddoe application from the Trust fund (including the costs of any interlocutory summonses) on an indemnity basis insofar as they do not recover them from D2. If D2 succeeds on all or part of D2's claim in the Main Action, but not otherwise, the Trustees' costs of the Beddoe application, including the costs of this costs application (see para 79 below), may be taxed at D2's option on an indemnity basis, and D2 shall have the opportunity to attend at the taxation and make representations.

(2) D2 is entitled to recover D2's costs of the Beddoe application (excluding the costs of the six interlocutory summonses) from the Trust fund taxed on an indemnity basis, save that D2's costs of the

share price manipulation allegations and the proceeds of crime allegations are disallowed and D2 shall pay the Trustees' costs of meeting them taxed on an indemnity basis.

(3) Without prejudice to the generality of sub-paragraph (2), the Court is satisfied that, subject to a detailed taxation, D2's costs of the first and fifth stages; the pre-trial review; the expenditure issue; and preparing and exhibiting the transcripts of the January 2009 meetings, have been reasonably incurred. Save as appears elsewhere in this Summary, it expresses no view as to the reasonableness of D2's remaining costs.

(4) D2's costs of the six interlocutory summonses are disallowed and D2 shall pay the Trustees' costs of those summonses taxed on a standard basis.

(5) Taxation shall take place at the conclusion of the Main Action.

79. The Trustees and D2 are both entitled to recover their costs of this costs hearing from the Trust fund on an indemnity basis. The hearing was a necessary part of these proceedings and one in which they have both achieved some measure of success. Taxation of the Trustees' costs (if circumstances arise in which D2 has an option to have them taxed and D2 chooses to exercise it) and D2's costs will take place at the conclusion of the Main Action.

80. I hope that the terms of the order following from this ruling can be agreed. The parties, in their discussions, will no doubt bear in mind that the main purpose of the order will be to set out what the Court has ordered should take place rather than to repeat any findings of fact or law which it has made.

81. If the terms of the order cannot be agreed then the parties have liberty to restore the matter for an oral hearing.

DATED this 24th day of March, 2016

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Hellman J